Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1617

ROBERT J. LACKLEN,

Petitioner,

v.

ALAN K. CAMPBELL, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner Robert J. Lacklen respectfully prays that a writ of certiorari issue to review judgment of the United States District Court of Appeals for the

District of Columbia entered on February 23, 1978 which ordered and adjudged that the judgment of the District Court appealed from in this cause is affirmed. That judgment affirmed the Memorandum and Order of the United States District Court for the District of Columbia which ordered that defendant's motion for dismissal or, in the alternative, for summary judgment, be, and the same hereby is, granted: and it is further Ordered Adjudged and Decreed that Judgment be entered for the defendants.

CITATIONS TO OPINIONS BELOW

The judgment without opinion of the United States Court of Appeals for the District of Columbia dated February 23, 1978 has not been reported as yet. The judgment affirmed the judgment of the District Court. The judgment of the Court of Appeals and the Memorandum and Order of the District Court are set forth in Appendices A and B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 23, 1978. The jurisdiction of this court is involked under U.S.C. Section 125 7 (3) since petitioner claims rights, privileges and immunities under the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the Court of Appeals improperly affirm the Memorandum and Order of the District Court dismissing the case in contravention of the Seventh Amendment of the Constitution of the United States?

2. Does the United States Constitution through the Seventh Amendment require the right of trial by jury be preserved?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNTIED STATES CONSTITUTION, AMENDMENT VII -- CIVIL TRIALS

In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Appellant seeks to review the judgment entered by the United States Court of Appeals for the District of Columbia. The judgment, entered February 23, 1978 affirmed the Memorandum and Order of the District Court which judged and decreed that judgment be entered for the defendants without trial.

Appellant commenced these procedings on April 18, 1975 with the filing of complaints that the defendants had: made unfounded conflict of interest charges against the plaintiff to the Department of Justice; illegally ordered plaintiff to resign his position and later coerced plaintiff's resignation from his position in the Office of the Secretary of the Department of Labor. Plaintiff also sought to refrain defendants from further harassment of plaintiff; to refrain from further interference with

plaintiff's pursuit of his chosen profession and to expunge certain derogatory information from plaintiff's civil service, security and personnel files.

Plaintiff demanded compensatory and punitive damages, costs and legal fees totaling $1.5 million.

Specifically plaintiff complains defendants, defendants agents or persons in concert with defendants charged plaintiff with a conflict of interest based on his relations with the attorney for the plaintiffs in the case of Douglas et al. v. Hampton et al. 512 F. 2nd, 976 (D.C. Cir 1975). The conflict of interest charges against the plaintiff were investigated bythe FBI and on April 28, 1971 the Assistant United States Attorney Robert A.W. Boraks determined that no further investigation should be conducted and he declined prosecution on the ground there was no evidence of criminal conduct. On June 30, 1971, two months later, the FBI was requested to reopen the case and interrogate plaintiff on charges of illegally receiving compensation from and disclosing privileged

information to, David Tatel, attorney for the plaintiffs in Douglas et al. v. Hampton et al.. On July 13, 1971, after the FBI had interrogated the plaintiff, AUSA again declined prosecution on lack of prosecutive merit and that there was no evidence of any offense committed.

Appellant also contends defendants illegally caused plaintiff's 1971 and 1972 tax returns to be audited by the Internal Revenue Service; intervened with the the CIA to have plaintiff's proposed contract with the CIA cancelled; illegally ordered plaintiff to resign his position at the Department of Labor within thirty days; interfered with plaintiff's pursuit of his professional research and activities by seven other separate actions; caused plaintiff's function and position to be transferred to a lower organization level resulting in a reduction in force action causing plaintiff's resignation; conspired to prevent plaintiff's validation study of the Federal Service Entrance Examination from being released by the Department of Labor to the attorneys in Douglas et al. v. Hampton et al.; intervened with four

State governments and the Institute for Behavioral Research in Creativity to prevent plaintiff's contracts to provide States with plaintiff's management audit system; and in a letter to Senator Sam Ervin, defendant Hampton declared plaintiff's conflict of interest charges should properly remain in the government files for the benefit of any Federal Agency which might consider plaintiff for employment.

Lawrence Silberman and Frank Zarb, sued for their actions while officials of the Department of Labor, were dismissed from this action on October 10, 1975 and their successors in office were substituted in their official capacities pursuant to Rule 25(d), F.R. Civ. P. although the District Court's October 10 Order granted plaintiff leave to seek to add Messrs. Silberman and Zarb in their individual capacties, plaintiff's attorneys were unable to join them as individual defendants.

During the course of the District Court litigation plaintiff undertook discovery through interrogatories, requests for production of documents and depositions.

Appealees answered the interrogatories and document production requests but objected to the subpoenas duces tecum directed to non-party Government Agencies, i.e., the U.S. Internal Revenue Service, Central Intelligence Agency and the Department of Justice. The District Court sustained the non-party Government agencies objections to the subpoenas duces tecum and granted appealees' motion for a protective order staying further discovery pending disposition of their motion to dismiss, or in the alternative, for summary judgment.

Defendant's motion to dismiss, or in the alternative, for summary judgment pursuant to Rules 12 (b) and 56, F.R. Civ. P. asserted as grounds therefor that the Court lacked jurisdiction over the subject matter, that plaintiff failed to state a claim upon which relief could be granted, he had failed to exhaust administrative remedies, his claims were barred by laches and since there was no desputed issues of material fact, they were entitled to judgment as a matter of law.

After oral argument on defendant's motion plaintiff was granted leave to engage in further discovery by way of deposition and to submit results of that discovery in the form of a revised statement of material facts which remain in issue. (Order of September 20, 1976). Plaintiff thereafter deposed representatives of the Civil Service Commission and the Internal Revenue Service and filed a supplementary memorandum arguing for a trial. On December 22, 1976 the District Court by Memorandum and Order dismissed plaintiff's claims for expunction of derogatory information in government files and for reinstatement with back pay finding, in both instances, that plaintiff had failed to exhaust available administrative remedies. The Court also entered summary judgment in favor of the defendant Hampton finding his claim for official immunity was well taken; that no genuine issue of material fact remained and defendant's motions for dismissal or summary judgment was granted and judgment entered for the defendants. Plaintiff's appeal to the United States District Court of Appeals followed.

Appellant's brief presented evidences of defendant's knowledge of the unlawfullness of their acts and bad faith; that the order for plaintiff to exhaust administrative remedies was improper and arguments that the summary judgment should have been denied and the case brought to trial.

Oral argument on the case was held before the Court of Appeals on February 16, 1978. Appellant argued that the District Court erred in not granting a trial in the presence of substantial and clear evidence showing a broad pattern of punitive and even criminal actions on the part of the defendants; in granting dismissal of defendants Frank Zarb and Lawrence Silberman; and in remanding the case for failure of plaintiff to exhaust administrative remedies. The District Court's Memorandum and Order dismissing the case and rendering summary judgment without a trial was based solely on the denials of defendants or any wrong doing. Plaintiff had no opportunity to test defendants or their agents by confrontation or cross examination or presenting witnesses in a trial as is his fundamental right provided by the Seventh Amendment provision for jury trials in civil cases.

On February 23, 1978 the Court of Appeals issued judgment without opinion affirming the judgment of the District Court. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the Constitution preserves the right of trial by jury where the value of the controversy shall exceed twenty dollars. Under our present system of laws the Court has unconstitutionally expanded its rightful role in law as referee by usurping the role of the jury and substituting trial by affidavit and summary judgment. The Seventh Amendment unequivocally preserves the right of trial by jury in civil cases where the value of the controversy shall exceed twenty dollars. The Seventh Amendment establishes the constitutional right to have judgment made by a jury of one's peers and not by a government official. The Grand Jury is an example of the same principle which denies judgments by government officials, reserving such

judgments to a jury of ones's peers.

Trial by affidavit and summary judgment plays into the hands of the defendants in civil cases by providing them with their principle weapon of defense, delay. Lawyers for the defense in civil cases can and always do take advantage of the many opportunities for delay provided by legal mores which allow endless delays thr ough postponements, recesses, objections, motions, depositions, discovery, unavailability of client or lawyer and other legalistic techniques which lend themselves so easily to stalling.

The maze of legal procedures which have been built up in legal processes by the courts has increased the role of lawyers and judges, allowed unnecessary delays and substituted trial by affidavits and summary judgment in contridiction to the right of trial by jury.

In the absence of a trial, the plaintiff is isolated from any direct contact with the court and the defendants are similiarly isolated and much to their liking. Plaintiff has no opportunity to present witnesses or confront defendants and their agents with testimony on the issues. Short of a trial plaintiff is confined to discovery, written affadavits and depositions. By the District Court's dismissal of Silberman and Zarb and the inherent inadequacies of the affidavit processes, the plaintiff was able to serve interrogatories to only one of the four principle defendants or agents. Although written interrogatories in cases with criminal aspects are generally considered to be of little worth, plaintiff was unable to do even this with Zarb, Silberman and McVeigh.

The substitution of interrogatories and other maneuvers for the right of trial by jury greatly impedes the achievement of justice by introducing literally years of delay in the prosecution of the case. The interrogatory process and other legal procedures add prohibitive legal expenses

which would be avoided if cases would be brought to trial quickly. In this case, the time and cost of lengthy interrogatories penalizes the plaintiff unduly because the defendants are provided legal representation by the Department of Justice without cost to the defendants.

Justice would be served more surely and with much less cost to both sides by going to a jury trial without requiring years of prior written interrogatories which any lawyer worth his salt knows aren't worth anything in bringing out the truth.

In his concurring opinion in ADICKES v. KRESS & Co., 398 U.S. 144, 176 (1969), Justice Black explained,

> The right to confront, cross examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of a trial before a live jury with live witnesses, and all the possibilities

> of considering human factors, should not be eliminated by substituting trial by affidavit and the sterile business of summary judgment.

CONCLUSIONS

For these reasons, the writ of cortiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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A P P E N D I C E S

Appendix A
Judgment of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 77-1224 (No Opinion) September Term, 1977

Civil 75-0580

Filed Feb 23 1978
George A. Fisher
Clerk

Robert J. Lacklen, Appellant.

v.

Alan K. Campbell, Chairman
Civil Service Commission, et al. Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, WRIGHT and WILKEY, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13 (c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
George A. Fisher, Clerk

Appendix B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT J. LACKLEN,
Plaintiff,

v.

ROBERT E. HAMPTON, et al.,

Civil Action No. 75-580

Filed
DEC 22 1976
James F. Davey
Clerk

MEMORANDUM AND ORDER

Plaintiff, former Director of Personnel Management Evaluation at the Department of Labor, seeks expunction of derogatory information in his personnel file, reinstatement with back pay, and damages from defendant Hampton for maintaining such information in plaintiff's file, for causing an audit of plaintiff's tax return, and interfering with plaintiff's pursuit of professional research. Defendants now move to dismiss on grounds of lack of subject matter jurisdiction, failure to state a claim, laches, and failure to exhaust administrative remedies. Alternatively, defendants move for summary judgment.

While plaintiff was employed at the Department of Labor in 1970, he discussed the validation studies on the Federal Service Entrance Examination with an attorney for the plaintiff in the case of Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975), an action featuring the same defendants. Plaintiff furnished technical advice on intelligence measures as applied to black persons. Thereafter, general counsel for the Civil Service Commission, of which defendant Hampton is chairman, referred to the Justice Department for investigation a possible conflict of interest violation (18 U.S.C. § 205) based on plaintiff's activity. The United States Attorney declined prosecution twice after two FBI investigations. Defendant Hampton notes his duty under law to so refer possible violations (28 U.S.C. § 535(b)), but plaintiff ascribes darker motives to him. Plaintiff's tax returns for 1971 and 1972 subsequently were subject to audit; plaintiff suggests that defendants caused and initiated the audit, while defendants present an IRS affidavit stating that plaintiff's returns were selected by a computor. Plaintiff also claims that he was negotiating with the CIA to perform research for it in 1972 but that defendants' false charge of

a conflict of interest caused the CIA to drop the negotiations. The CIA claims to have no records of any such negotiations.

Plaintiff attempted to find out whether the FBI report on the conflict of interest inquiry remained in his file through Senator Sam Ervin. Defendant Hampton stated to Ervin that the reports would remain in the file, because plaintiff's "capacity to distinguish between (government business and closely related personal and professional business) would be a relevant consideration for most Federal positions to which he might aspire."

Plaintiff's position in the Labor Department was abolished in 1972, and he resigned. Plaintiff alleges that defendants wrongfully have interfered with his attempts to obtain employment elsewhere, both in and out of government service.

(1) MOTION TO DISMISS

(A) Failure to exhaust administrative remedies

(i) Expunction of information in file: Defendants claim that plaintiff has failed to exhaust administrative remedies available under the Privacy Act (5 U.S.C. § 552a). Plaintiff contends that the Act was preceded by institution of this law suit. But since the information contained in plaintiff's files allegedly work present and ongoing harm, the precise relief plaintiff seeks conceivably can be obtained through agency procedures. See Bosse v. Levi, Civ. No. 75-1373 (D.D.C. Jan. 26, 1976). The agency cannot grant plaintiff's other requested relief, but this court believes that it should dismiss claims where a Privacy Act administrative remedy is available and subsequent judicial review is possible. See Emory v. Laise, Civ. No. 75-381 (D.D.C. Dec.22, 1975). Plaintiff alternatively argues that defendant Hampton's statement that he would retain the information in the file constitutes the requisite administrative decision. Plaintiff does not contend, however, that this follows the Privacy Act's requirements for administrative consideration.

(ii) Reinstatement and back pay: Defendant contends that the record does not reflect that plaintiff ever took an appeal to the agency or to the Civil Service Commission on his claim for reinstatement and back pay; thus defendants suggest dismissal of this claim as premature. Plaintiff, however, argues that he was precluded from substantively challenging the Labor Department's action. Plaintiff was not fired; his position was abolished pursuant to a reduction in force decision. Reduction in force actions are not considered "adverse actions" for purposes of administrative review. 5 U.S.C. § 752.103(b) (3). This argument ignores, however, the fact that plaintiff contends that he was forced to resign; a coerced resignation can constitute an adverse action for which certain administrative remedies are available. See Goodman v. United, 424 F. 2d 914 (D.C. Cir. 1970). The record does not reflect that an appeal ever was taken on the reinstatement claim to the agency or Civil Service Commission. Accordingly, the claim is barred for a failure to exhaust administrative remedies.

Sampson v. Murray, 415 U.S. 61 (1974); Polcover v. Secretary of Treasury, 477 F.2d 1223, 1225-6 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Because the court decides that the reinstatement and back pay claim is barred by failure to exhaust administrative remedies, it need not consider defendant's argument that this claim also is barred by doctrine of laches.

(2) Summary Judgment Motion

(A) Official Immunity

Defendant Hampton argues that plaintiff's complaint concerns the performance of defendant's duty as an officer of the United States; thus he reasons that the action is barred by the doctrine of official immunity. With regard to the referral of the possible conflict of interest to the Justice Department, defendant notes both that the record does not disclose that Hampton made the initial referral and that such referral is required by 28 U.S.C. § 535(b). Defendant claims that this action and the maintenance of information in plaintiff's personnel file were within the "outer perimeter" of his official duties.

See Barr v. Mateo, 360 U.S. 654, 575 (1959); Gregoire v. Biddle, 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Defendant does not make the same immunity claim for the alleged instigation of the IRS audit or impeding of plaintiff's employment efforts, rather contending that these claims are sheer speculation unsupported by any evidence in the record. Plaintiff argues that recent cases impose a requirement on defendant in addition to the outer perimeter test in Barr: that the defendant acted in the good faith belief that his actions were lawful. To a certain extent it is precisely the question of defendant's good faith that is at issue in this case. An early case, Spalding v. Vilas, found government officials not liable on an official immunity ground even though it was alleged that the officer acted maliciously. 161 U.S. 483 (1896). More recently, the Supreme Court has required a government official to entertain a good faith belief as to the lawfullness of his act. See

Scheur v. Rhodes, 416 U.S. 232, 247-48 (1974); Pierson v. Ray, 386 U.S. 547, 555 (1967); Apton v. Wilson, 506 F. 2d 83, 91-92 (D.C. Cir 1974); Smith v. Burns, Civ. No. 72-2251 (D.D.C. Oct. 29, 1974). Although a court will not use excessive hindsight to judge officials actions, if as plaintiff alleges, defendant's purposes were largely retaliatory, then good faith could be absent. Plaintiff's argument scarcely merits a full-scale trial as to the conflict of interest referral and maintenance of information in the file claims. Plaintiff has not presented even the smallest amount of evidence that would suggest that defendant Hampton did not in good faith believe his actions to be lawful. Even if Hampton harbored some malice toward plaintiff, this would not affect his good faith belief as to the lawfulness of his activities in referring the conflict of interest as required by statute and in maintaining what he considered relevant information in the personnel file. The court concludes that defendant's claim of absolute immunity is well-taken with respect to these two claims.

On the other hand, the doctrine of official immunity cannot provide a cloak for the claims concerning instigation of a tax audit or impeding plaintiff's employment prospects: defendants hardly could maintain a good faith as to the lawfulness of this activity. As to these two claims, however, the court does not perceive that any genuine issue of material fact has been presented. An affidavit from the IRS reveals that plaintiff's tax return was chosen for audit by computor, and a CIA affidavit reveals that that agency has no records of any employment negotiations with plaintiff. The plaintiff, after argument on defendant's motion to dismiss or for summary judgment, was granted leave by order of September 20, 1976 to engage in further discovery in the form of a revised statement of material facts which remain in issue. On December 10, 1976 plaintiff submitted a supplementary memorandom but has proffered no new evidence or arguments. Thus the court has given plaintiff every chance to engage in discovery in an attempt to present to the court at least a shred of credible evidence on the IRS and employment interference claim. No such evidence has been forthcoming to contradict the affidavits submitted by defendants. The court therefore

must conclude that no genuine issue of material fact remains in issue as to these two claims and that the defendant Hampton is entitled to judgment as a matter of law.

The court thus has concluded that defendants are entitled either to dismissal or summary judgment as to each claim raised by the plaintiff. The court therefore must grant defendant's motion and enter judgment in favor of defendants.

Accordingly, is, by the court, this 22d day of December 1976,

ORDERED that defendant's motion for dismissal or, in the alternative, for summary judgment, be, and the same hereby is, granted; and it is further

ORDERED ADJUDGED and DECREED that judgment be entered for defendants.

Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

Appendix C

Brief of Robert J. Lacklen

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ROBERT J. LACKLEN,
Plaintiff,
v.
Robert E. Hampton, et al.
Defendants.
No. 77-1224

ON PETITION TO REVIEW AND SET ASIDE MOTION AND ORDER OF JUDGE FLANNERY OF THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF ROBERT J. LACKLEN

CERTIFICATE OF COUNSEL

No. 77 - 1224

Robert J. Lacklen, Plaintiff v.
Robert E. Hampton, et al.,

On Petition to Review and Set Aside
Orders of Judge Flannery of the
United States District Court for the
District of Columbia

Certificate Required by Rule 8 (c)
of the General Rules of the United
States Court of Appeals for the
District of Columbia Circuit.

The undersigned, counsel of record for Robert J. Lacklen certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that judges of this court may evaluate possible disqualification or recusal.

PARTIES IN SUPPORT OF APPEALEE

U.S. Department of Labor
U.S. Department of Justice
U.S. Central Intelligence Agency
U.S. Attorneys Office for the District of Columbia
U.S. Internal Revenue Service
U.S. Civil Service Commission
U S. Housing and Urban Development Agency

Robert E. Hampton, Defendant
Lawrence H. Silberman, Defendant
Frank G. Zarb, Defendant
Edward J. McVeigh, Plaintiff's superior at Labor
Raymond Jacobson, Hampton's agent at CSC
Arthur L. Tackman, HUD, Originated conflict of interest charge against plaintiff
Anthony L. Mondello, CSC, Submitted conflict of interest charge to Dept. of Justice
Angus Thuermer, CIA, Plaintiff's contact at CIA
William Colby, CIA, Made decision to drop contract.
F.W.M. Janney, CIA, Signed CIA interrogatory answer
Earl J. Silbert, U.S. Attorney, conflict of interest
J.R. Gill, U.S. Attorney's Office, conflict of interest

Lester B. Seidal, U.S. Attorneys Office, conflict of interest

Lucy A Hummer, Attorney, Dept. Justice, initiated the second conflict of interest FBI investigation

Mr. Weiglian, Attorney, Dept. Justice, party to the decision to reopen plaintiff's conflict of interest investigation, 6/29/71, and also made decision not to answer plaintiff's letter of March 6, 1973 requesting purging of conflict of interest record.

Will R. Wilson, Asst. Attorney General, Criminal Division who initiated both FBI investigations of plaintiff on conflict of interest.

Mrs. M. Lanman, Auditor IRS, Conducted the audit of plaintiff's IRS return for 1971

PARTIES IN SUPPORT OF APPELLANT

David Tatel, Attorney for plaintiffs in Douglas v. Hampton

Wayne Frankenfield, Special Agent FBI, Objected to reopening plaintiff's second FBI investigation

Robert A.W. Boraks, Assistant United States Attorney, Made both decisions to decline prosecution of plaintiff.

Attorney of record for Robert J. Lacklen

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STATEMENT OF THE CASE

(Omitted)

ISSUES

A. Was Judge Flannery's MEMORANDUM AND ORDER arbitrary, capricious, an abuse of descretion and not in accordance with the law in that Judge Flannery erred in not granting a trial in the presence of substantial and clear evidence showing a broad pattern of punitive and criminal actions on the part of the defendants.

B. Was Judge Flannery's Order granting dismissal of defendants Frank Zarb and Lawrence Silberman arbitrary, capricious, an abuse of decretion and not in accordance with the law in that Judge Flannery erred in dismissing Zarb and Silberman

from the case as individuals when their actions were clearly extra-legal acting as agents of Robert E. Hampton and the Nixon Administration.

C. Was Judge Flannery's ORDER to dismiss, based on the defendant's claim that plaintiff has failed to exhaust administrative remedies under the Privacy Act (5 USC § 552a), arbitrary, capricious, an abuse of descretion and not in accordance with the law in that Judge Flannery erred in remanding the case for failure of plaintiff to exhaust administrative remedies when plaintiff's only avenues of administrative appeal were to the Department of Labor and the Civil Service Commission both organizations whose top officials, Hampton and Silberman had committed the illegal acts against the plaintiff.

PENDING CASE HAS NEVER BEEN BEFORE THIS COURT

ARGUMENT

I. OFFICIAL IMMUNITY

Judge Flannery erred in his order stating that the court concludes that the defendants claim of absolute immunity is well taken. Bad faith on the part of the defendants was clearly demonstrated in the record.

1. The conflict of interest charges brought against the plaintiff by the Civil Service Commission based on an internal memorandum written by Arthur Tackman, Director of Personnel for HUD. Both HUD and the Civil Service Commission were defendants in the case of Douglas v. Hampton et al., on which case the plaintiff was serving as an expert and planned witness for the plaintiffs in that case. It should be noted that a government agency which gains knowledge of a suspected conflict of interest is required by law to report such information to the nearest U.S. Attorney. HUD did not do this but rather submitted the conflict of interest information to the U.S. Civil Commission which was a fellow defendant with HUD on the case of Douglas v. Hampton et al..

2. The conflict of interest claim made by HUD and the Civil Service Commission was without merit. The claim was based on the mere fact that the plainaiff had made two telephone calls to Arthur Tackman of HUD in which the case of Douglas v. Hampton et al. was discussed.

3. The conflict of interest charges against the plaintiff were investigated by the FBI and on April 28, 1971 the Assistant United States Attorney Robert A.W. Boraks determined that no further investigation should be conducted and he declined prosecution on the grounds there was no evidence of criminal conduct. On June 30, 1971, two months after the case was closed by him, the FBI was requested to reopen the case to have the plaintiff interviewed and to interrogate him on his motivation for calling Tackman, whether plaintiff had made any other efforts on behalf of the plaintiffs in the pending law suit against Hampton, Chairman of the Civil Service Commission (Douglas v. Hampton, et al.) and whether I had received or had been promised any compensation for any of my efforts.

The plaintiff offers that the reopening of the investigation to have him interviewed had no basis in fact and was instigated solely to impugn the plaintiff.

4. The motivation for all the actions taken by Hampton and his agents against the plaintiff was clearly obstruction of justice to impugn and prevent the plaintiff from advising and being a witness for the plaintiffs in the case of Douglas v. Hampton et al.. Bad faith is clearly demonstrated by the defendants attempts to interfere with and negate the plaintiff's Department of Labor study of the validity of the Federal Service Entrance Examination which would, and later did, have a crucial enfluence on the appeal in Douglas v. Hampton et al.. When the FBI agents interrogated plaintiff on July 12, 1971, SA Wultich specifically questioned the plaintiff on whether plaintiff had released any information on the FSEE validation study to Dave Tatel. Plaintiff answered by pointing to the computor tapes of the studies data on plaintiff's desk and stating that the study was still in progress and no results were yet available. In September of 1972,

David Tatel made a written request to the Department of Labor for a copy of the FSEE validation report which was denied by Edward J. McVeigh after conspiring with Raymond Jacobson of the Civil Service Commission on a basis for denying David Tatel's request. Tatel appealed the denial to the Solicitor of the Department of Labor under the Freedom of Information Act and obtained the report. The report was filed with the appeal brief in the case of Douglas v. Hampton et al.. The Department of Labor Federal Service Entrance Examination study was cited in the appeal decision in the case of Douglas v. Hampton et al., 512 F. 2d, 976 (D.C. CIR 1975).

5. Other evidence of bad faith was contained in the record of an internal memo of SA Nicholas Wultich on his second investigation in which the following statement appears, "For information Bureau, AUSA Robert A.W. Boraks was very displeased that the subject was interviewed and that the Department did not first consult him." Also in a memo from Lucy A. Hummer, Attorney in the General Crimes Section, Department of Justice, Ms. Hummer relates that SA Wayne Frankenfield of the FBI had

called Hummer regarding the memorandum sent the FBI by Will R. Wilson reopening the investigation and Frankenfield had told Hummer it was his opinion there was no 205 violation and that he did not want to conduct the requested interview unless Hummer could inform him at this time that Hummer would prosecute Lacklen. The plaintiff holds that these facts in the record are clear evidence that the conflict of interest charges against the plaintiff were without merit and were brought against the plaintiff for the purpose of obstructing justice.

6. In a letter to Senator Sam Ervin dated September 19, 1972 defendant Hampton gratuitously stated his belief, "We think it proper that this investigative information be retained in the file for whatever benefit it may be to any Federal Agency which may consider Mr. Lacklen for employment." This is clear evidence of Hampton's punitive motivation which caused him to originate the charges of conflict of interest against the plaintiff.

II. Defendants Motion For Summary Judgment Should Have Been Denied and The Case Brought To Trial.

1. Defendant Hampton's motions for summary judgment on the issues rests entirely on his denials of any wrongdoing. Plaintiff has had no opportunity to test defendant's or his agent's denials by cross examination. In his concurring opinion in ADICKES v. KRESS and Co., 398 U.S. 144, 176 (1969), Justice Black explained that:

> the right to confront, cross examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of a trial before a live jury with live witnesses, and all the possibilities of considering human factors, should not be eliminated by substituting trial by affadavit and the sterile business of summary judgment.

2. In support of the need for a trial in this case, the court should understand the difficulty of seeking justice

on the part of the plaintiff in the absence of a trial. To present, the legal procedures and mores have isolated plaintiff from any direct contact with the court. Plaintiff was under the handicap of pursuing the case en absentia and by correspondence with plaintiff's attorneys. This left much to be desired when one considers the screen that legal procedures place between the plaintiff and the court and deny any direct contact with the court or defendants in the absence of a trial. Without a trial the plaintiff has no opportunity to present witnesses or confront defendants with testimony on the issues. Plaintiff lists examples below of information bearing upon Judge Flannery's Memorandum and Order which demonstrate the necessity of a trial if justice is to be done.

a. Judge Flannery's Memorandum and Order turned aside the claim of the plaintiff that Hampton had impeded plaintiff's contracting with the CIA, on the basis of the CIA's affadavit which stated that no record was found which indicated the plaintiff was ever considered for employment or association with the CIA. The CIA

affadavit was signed by F.W.M. Janney, Director of Personnel of the CIA. Mr. Janney was himself present at the presentation the plaintiff made to the top officials of the CIA including William Colby. There were records, one of which was a memo from Angus Theurmer to William Colby recommending the plaintiff make the presentation. The plaintiff was shown this memo, as was the plaintiff's colleague, Mr. Sam Daniels, who was present when Mr. Theurmer showed the memo to the plaintiff. Mr. Janney also was the individual who objected to the contract with the plaintiff, this information was transmitted to Mr. Daniels from Angus Theurmer and transmitted to the plaintiff by a note which contained this and other information. Plaintiff has the note to present as evidence as well as Mr. Daniels as a witness. The CIA's affadavit was unresponsive and false.

b. Judge Flannery's Memorandum and Order turned aside the plaintiff's complaint that defendant Hampton had caused plaintiff's tax return for 1971 to be audited, all on the basis that the IRS affidavit

revealed that the plaintiff's tax return was chosed for audit by the computor. In fact, the deposition by the IRS shows that all tax returns of individuals are scored by the DIF computor program and there is no selection made by the computor of individual returns to be audited.

c. By Judge Flannerys dismissal of Zarb and Silberman from the case and by the inadequacies of the discovery process, plaintiff has been able to serve interrogatories on only one of the four principle defendants in this case. Plaintiff was not able to even send written interrogatories to Silberman, Zarb or McVeigh, let alone receive their answers. Although written interrogatories in cases with criminal aspects are not worth much of anything, plaintiff was unable to do even this. In spite of this fact Judge Flannery granted the defendant's motion to dismiss.

D. There is much evidence of conflict of interest in this case on the side of the government and the defendants.

Plaintiff visited the U.S. Attorney's Office for the District of Columbia prior to plaintiff's filing of his complaint in this civil case. Plaintiff presented information in writing on obstruction of justice on the part of defendants of this case to J.R.Gill, Administrative Assistant U.S. Attorney and Lester B. Seidal. Both advised plaintiff to avoid causing a criminal investigation because discovery on the civil case would cause all defendants to take the Fifth, thus holding up plaintiff's civil case. Mr. Seidal advised plaintiff to have plaintiff's attorney, then William Ohlhausen, to get in touch with him and he, Seidal would follow the case and work with Ohlhausen whom he knew. Plaintiff's attorney Ohlhausen did contact Seidal but nothing ever came of it. Plaintiff believes there is much evidence of conflict of interest on the side of the defense. U.S. Attorney Silbert in whose office plaintiff filed complaint of obstruction of justice later shows up on the legal briefs in this case as attorney for the defendants.

III. On Remand of Plaintiff to Exhaust Adminstrative Remedies

This case should be a criminal case of obstruction of justice against the defendants. The plaintiff was turned away at the U.S. Attorney's Office when he brought obstruction of justice charges to that office.

1. Plaintiff as a former Director of Personnel of NASA knew full well the administrative remedies available to him. The two channels of appeal available were the U.S. Department of Labor and/or the U.S. Civil Service Commission. Lawrence Silberman, one of the defendants in this case was Under Secretary of Labor and another was Robert E. Hampton, Chairman of the Civil Service Commission. The futility of entering appeals to the Department of Labor and the U.S Civil Service Commission is obvious.

IV. CONCLUSIONS

1. That Judge Flannery erred in dismissing Zarb and Silberman from the case.

2. That Judge Flannery erred in not granting a trial in the presence of substantial and clear evidence showing a broad pattern of punitive and criminal actions on the part of the defendants.

WHEREFORE: The plaintiff respectfully prays that this court vacate and set aside the MEMORANDUM AND ORDER of the District Court, or, in the alternative, remand the procedings to the District Court with appropriate instructions to proceed with a trial.

Respectfully submitted,

Robert J. Lacklen

Robert J. Lacklen
Attorney for Himself
Route 4, Box 111 H
Leesburg, Virginia 22075
202 275-5544

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing on Petition to Review and Set Aside Orders of the United States District Court for the District of Columbia, was hand delivered on the 8th day of April, 1977, to the office of Nicholas Diacou, Attorney for Defendants, United States Department of Justice, Washington D.C. 20530

Robert J. Lacklen

Robert J. Lacklen
Attorney for Himself

Appendix D

FBI report of SA Nicholas Wultich
May 4, 1971

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation

Copy to: 1- United States Attorney
Washington, D.C. (Attention: Assistant United Attorney ROBERT A.W. BORAKS)

Report of: NICHOLAS WULTICH
Date: May 4, 1971

Field Office File #: 58-1235

Title: Robert Jones Lacklen

Character: BRIBERY - CONFLICT OF INTEREST

Synopsis:

Subject, a Department of Labor employee, contacted ARTHUR L. TACKMAN, Director of Personnel, Housing and Urban Development (HUD), on 3/3/71 and reported being contacted by attorney representing plaintiffs who filed suit naming Civil Service Commission and HUD as defendants in attacking Federal Service Entrance Examination(FSEE). Subject admitted he would testify for plaintiffs and questioned Tackman if he would be willing to testify on behalf of plaintiffs if Secretary of HUD was dropped as a defendant. Tackman interviewed, reported no offer made to get him to testify for plaintiffs and he considered entire matter as one of subject merely trying to get his views. AUSA declined prosecution on basis of no evidence of criminal conduct.

-C-

WFO 58-1235
DETAILS: AT WASHINGTON D.C.

This case is predicated upon a letter dated April 21, 1971, from Will Wilson, Assistant Attorney General, Criminal Division, United States Department of Justice, to the Director, Federal Bureau of Investigation which submitted correspondence from the General Counsel of the Civil Service Commission (CSC), indicating a possible violation of 18 United States Code 205 on the part of Department of Labor employee Robert Lackland. It was requested that an appropriate investigation be conducted of these charges, and in addition, an effort be made to determine LACKLAND's motivation in making the call to ARTHUR L. TACKMAN, Director of Personnel at the Department of Housing and Urban Development (HUD). The letter also requested that it be determined whether LACKLAND has made other efforts on behalf of the plaintiffs ing the Federal Government, and whether he has received or been promised any compensation for his efforts.

The above correspondence enclosed a letter from ANTHONY L. MONDELLO, General Counsel for the United States Civil Service Commission, which raised the question whether ROBERT LACKLEND, an employee of the Department of Labor, has by his intersession in behalf of the plaintiffs in a pending law suit against Chairman ROBERT E. HAMPTON of CSC and other Federal Officers, violated 18 United States Code 205. It was noted that a violation would have occurred if Mr. LACKLAND, by reason of his intersession, served as "agent" for the plaintiffs before a "department"(HUD) in connection with a "procedings" or "claim" or "other particular matter" in which "the United States" has a "direct and substantial interest.

The letter went on to comment that it was unclear whether Mr. LACKLAND in making the telephone call to Mr. TACKMAN (the employee at HUD) was acting on his own inititive, or that such an intercession by him was in any way related to "the proper discharge of his official duties" as a Department of Labor employee.

It was noted that MONDELLO was referring to the lawsuit of Douglas etal, v. Hampton et al., C.A. Number 313-71, United States Court for the District of Columbia, attacking the Federal Service Entrance Examination (FSEE), the defense of which was pending in the Civil Division of the Department of Justice.

MONDELLO, in support of his above comments, enclosed two memorandums prepared by ARTHUR L TACKMAN, Director of Personnel at HUD.

In his memorandum of March 3, 1971, TACKMAN reports being contacted telephonically by ROBERT LACKLAND. He described LACKLAND as the former Director of Personnel at the National Aeronautics and Space Administration (NASA), who had been work ing with a research foundation in North Carolina for the past six or seven years and who has just returned to the Department of Labor as, he believed, a Special Assistant in the Bureau of Manpower. According to this memorandum, TACKMAN reported that LACKLAND had informed him (TACKMAN) that he (LACKLAND) had been appa ached and asked to testify in the suit by the attorneys for the eight employees in Chicago who are suing the Civil Service Commission and Mr. GEORGE ROMNEY, Secretary of HUD, on the matter of the racial bias of the Federal Service Entrance Exam. TACKMAN drew his conclusion that

apparently LACKLAND's research foundation had been engaged in validating tests and had offered the Civil Service Commission an alternative test to the FSEE which they had alleged to have been validated and established as an "unbiased" test. TACKMAN wrote that LACKLAND asked if HUD would be willing to testify on bahalf of the complainants in terms that the FSEE made it difficult to recruit minority candidates for the HUD intern program, and that the attorney for the complainants was interested in proposing that Mr. Romney be removed as a party if HUD would then testify for the complainants. TACKMAN wrote that he informed LACKLAND that it was his judgment that HUD would take the position of strict neutrality and that as long as Mr. ROMNEY was a defendant, HUD would clearly support their position of stressing equal opportunity; that even if Mr. ROMNEY were not a defendant, their position would remain the same; that is, to support the CSC as a member of the Federal Government community.

In his subsequent memorandum of March 26, 1971, TACKMAN informed Mr. MONDELLO, General Counsel at the CSC, that he would like to make it clear that Mr. LACKLAND appeared to be speculating with respect to the matter of withdrawing Mr. ROMNEY's name and on the matter of HUD's willingness to testify. He also wrote that Mr. LACKLAND's conversation appeared to be exploratory in terms of "if" Mr. ROMNEY was dismissed from the suit, would HUD be willing to testify in behalf of the complainants case. He also noted that no direct proposal was made or indication given that he, Mr. LACKLAND, had been given authority to formally make a request.

On April 28, 1971, the facts in this case were discussed with Assistant United States Attorney ROBERT A.W. BORAKS. After reviewing the matter, Assistant United States Attorney BORAKS advised that no further investigation should be conducted and he declined prosecution on the grounds there was no evidence of criminal conduct.

Appendix E

FBI Report of SA Nicholas Wultich
July 14, 1971

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation

Copy to: 1 - United States Attorney, Washington, D.C.: (Attention: AUSA ROBERT A.W. BORAKS)

Report of: NICHOLAS WULTICH
Date: July 14, 1971

Field Office File #: 58-1235

Title: ROBERT JONES LACKLEN

Character: BRIBERY - CONFLICT OF INTEREST

Synopsis:

ROBERT JONES LACKLEN, Chief of Personnel Management Evaluation Division, United States Department of Labor, interviewed. He furnished background showing his extensive interest in the field of research to identify creativity and managerial talent. He previously conducted such research while with Smith Richardson Foundation which developed biographical inventory method of testing; claimed such test given high school students proved "blacks were just as intelligent as whites" and that intelligent quotient exams rendered in

various educational institutions, including Government, were "culturally biased" and "culturally loaded". He considered Federal Service Entrance Examination (FSEE) "culturally biased". He was brought in by the Labor Department to evaluate their personnel management program and determined that training did not improve performance. He initiated study of validation of procedures in making selection of candidates, but before starting, he checked with a number of personnel managers with other agencies, including the Civil Service Commission, to avoid any duplication. Such contacts led him to contact ARTHUR L. TACKMAN, Personnel Director at Housing and Urban Development (HUD). He recalled commenting to TACKMAN, that HUD would probably be dropped as defendants as to FSEE used by the CSC appeared to be the main issue. LACKLEN admitted contacting DAVID S. TATEL attorney for the plaintiffs in this same case; he explained that he also wanted to determine if TATEL had found any evaluation study of the FSEE which may have been performed. TATEL then approached him as possible witness and has met with LACKLEN a number of times to discuss explanations of FSEE, CSC coded ratings, etc. LACKLEN said he received no compensation from TATEL and in no way acted as agent. He admitted he technically may have committed a violation of Conflict of Interest Statute when he contacted Dr. EDWIN HENRY of University of Rochester to determine if Dr. HENRY would be willing to testify on behalf of plaintiffs; Dr. HENRY refused. LACKLEN explained he was in contact with Dr. HENRY from time to time and agreed to make the approach for TATEL. AUSA declined prosecution on basis

of no evidence of any offense committed.

-C-

ENCLOSURE

TO DEPARTMENT OF JUSTICE

Copy of letter from ROBERT J. LACKLEN to Mr. EDWARD J. MC VEIGH dated December 28, 1970.

Booklet entitled "ALPHA", "Biographical Inventory".

Booklet entitled "Manual for ALPHA" a Biographical Inventory".

Article dated May 19, 1971, and entitled Occupational Personnel Selection.

DETAILS: AT WASHINGTON, D.C.

This case was reopended on the basis of a letter dated June 30, 1971, from WILL WILSON, Assistant Attorney General, Criminal Division, United States Department of Justice, to the Director, Federal Bureau of Investigation, which requested that ROBERT JONES LACKLEN be interviewed to determine his motivation in making the telephone call to ARTHER L. TACKMAN, Director of Personnel at the Department of Housing and Urban Development (HUD), and to determine whether he has made any other efforts on behalf of plaintiffs in the pending law suit against ROBERT HAMPTON, Chairman of the Civil Service Commission, and whether he has received or has been promised any compensation for any of his efforts.

ROBERT JONES LACKLEN, Chief of the Personnel Management Evaluation Division, United States Department of Labor, was contacted at his office, Room 6328. After having been informed of the nature of the investigation and reason for the contact, LACKLEN read and signed an Advise of Rights form, and furnished the following information after being placed under oath by Special Agent NICHOLAS WULTICH:

LACKLEN advised that he had served as Personnel officer with the United States Government for over twenty-five years before retiring in 1965. This included being the Director of Personnel for the National Advisory Committee for Aeronautics and its successor, the National Aeronautics and Space Administration (NASA). He retired from NASA in 1965 and then worked for the Smith Richardson Foundation in Greensboro, North Carolina until he returned to Government service and his present position on November 28, 1970.

His function with the Smith Richardson Foundation was personnel research, specifically the identification of creattivy and managerial talent. Therefore as a result, among other things, he did extensive research and developed measures for identifying creative talent. Among the measures developed was a biographi cal inventory which he recalled was rendered to some 13,000 high school students. This examination was rendered in the same percentage basis to Negro students as to the total population of Negros in the State. Out of this examination, it was their conclusion that "blacks were just as intelligent as whites." This research also conclusively indicated in their opinion that the intelligence quotient (IQ) rendered in various education institutions, industry, and Government agencies were "culturally biased" and culturally loaded".

whereas the biographical inventory was not weighed culturally. Approximately $ 1½ million was spent in this research. In his opinion, this was the first large scale proof the examinations were biased and do not properly measure the basic intelligence of the examinee nor his potential.

LACKLEN advised he has a psychology degree from Stanford University and his specialty was testing, although he has been primarily employed in personnel mangement. Over the years he has had numerous articles published regarding personnel matters. Because of his extensive background and participation in research, he considered himself as being fairly well known throughout the "psychological world" and recognized as an expert in the area of testing.

In his opinion, the Federal Service Entrance Examination (FSEE) in its present form involves basically intelligence testing. He stated that the test actually has two parts, namely, verbal and mathematical. As a result of the examination being an intelligence measure, in his opinion, the results of the research indicated the examination was 'culturally biased".

LACKLEN advised that when he returned to Government service with the Department of Labor, he was brought in to evaluate their personnel management program at the Deaprtment of Labor. He explained that he first did a training evaluation and determined that training does not improve performance. Among the first things he did in December, 1970, was to make a validation of the precedures used in making the selection of candidates. He pointed out

that since training did not necessarily improve an employee, selection of the initial employee was most important. Since the FSEE is the primary vehicle in making a selection, he then started a validation of the FSEE. His first contact with the Civil Service Commision (CSC) was very early in the program, possibly in December, 1970, to determine whether that organization had any knowledge of any validation studies which had been made of the FSEE. He started with the Civil Service Commission as he felt they would be aware of any such study and he did not desire to duplicate any validation if validation studies had been made by the CSC or any other Government Agency. CSC did not have any validation studies and the only studies made was between the FSEE scores and training success; however, there was no study conducted as to the relevancy of the scores and the examinee's success, that is, how fast and far he progressed. There was an indication that such a study had been made at the Federal Aviation Administration (FAA) relative to traffic controllers however, that was merely an attempt to get the traffic controllers from having to take the examination.

In his endeavors to determine whether any validation studies had been made in this area, he was in contact with the personnel managers of other government agencies. He was unable to locate any such studies and as a result such a study was instituted at the Department of Labor under his direction. This study was made with the full knowledge of the CSC; the results are not known since it has not been completed to date.

LACKLEN advised that it was during the course of his search to determine if any previous studies had been made by the CSC and other agencies that he noted the pending trial in Chicago involving a number of Housing and Urban Development (HUD) employees who intended to bring suit against HUD as well as the CSC to contest the FSEE. He stated that he probably initiated contact with DAVID S. TATEL who was the attorney for these HUD employees; his purpose was to determine if TATEL had located some type of information of interest to him(LACKLEN) in evaluating the FSEE. As a result of this contact, TATEL instead approached him as a possible witness in the lawsuit and LACKLEN agreed to testify as a witness for the plaintiffs if desired. He has met with TATEL approximately eight to ten times to date to discuss various explanations of the FSEE, CSC code ratings, etc., together with his opinion of the FSEE.

LACKLEN advised that during the course of his contacts with other Agency personnel managers to determine if any validation study had been made of the FSEE in the past, the HUD trial may have been mentioned on occasions and he LACKLEN may have made some remarks in jest relative to the trial. He recalled that among those he did call was ARTHUR L. TACKMAN, Director of Personnel at HUD, and recalled discussing HUD being named as a defendant in the case. He recalled commenting to TACKMAN that it was his opinion that HUD would be dropped as defendants in the case as the main issue seemed to be the FSEE used by the CSC. It was his opinion that probably TACKMAN, along with many personnel managers, saw weak points in the FSEE; however, he

naturally assumed that TACKMAN, since his Agency was a defendant in the case, would not be interested in taking the stand as a witness for the plaintiffs.

He stated that he was not asked by TATEL to call TACKMAN nor any other Government personnel manager or employee to seek their assistance as a possible witness for the plaintiffs in the case. He stressed that he has received no compensation from TATEL nor acted as an agent for TATEL in any manner. LACKLEN noted that he once taught a course in Conflict of Interest while employed as Director of Personnel at NASA and was fully aware of the violation. He noted however, that he now recalled making one contact for Tatel, and that was to Dr. EDWIN HENRY of the University of Rochester. He described Dr. HENRY as the "No. 1" man in the field of Industrial Psychology and a consultant to the Smith Richardson Foundation. He explained that on one occasion during his discussion with TATEL, he had asked TATEL if he had contacted Dr. HENRY; Dr. HENRY was unknown to TATEL. He stated that once TATEL learned of the identity and background of Dr. HENRY and the fact that he (LACKLEN) occassionally contacted Dr. HENRY, TATEL asked him to make the contact to determine if Dr. HENRY would be willing to become a witness in their lawsuit. LACKLEN stated that he made this contact, but Dr. HENRY declined to appear as a witness. LACKLEN stated that in his contacting Dr. Henry he technically may have violated some segment of the Conflict of Interest Statute.

LACKLEN stressed that during his contacts with TATEL, he has not disclosed any information which he received as an employee of the Department of Labor.

LACKLEN made available a copy of a letter he had written to his superior, EDWARD J. MC VEIGH by which he obtained approval to continue his outside activity with Prediction Inc., an organization formed for the purpose of developing and publishing a number of tests measures designed to identify talent. He also made available a copy of a booklet entitled "ALPHA" which is an example of the Biographical Inventory Test developed by the Smith Richardson Foundation together with a Manual explaining the test. He also made available an article entitled "Occupational Personnel Selection" dated May 19, 1971, which he expected to publish soon in some journal.

He furnished the following background information pertaining to himself:

Name:	ROBERT JONES LACKLEN
Residence:	1200 S. Courthouse Road, Arlington, Va.
Date and Place of Birth:	October 11, 1913, Bozeman, Montana
Height:	Five feet ten and a half inches
Weight:	One hundred fifty seven
Eyes:	Brown
Hair:	Black and Graying
Marital Status:	Divorced
Social Security Number:	115-09-9212
Relatives:	JESS LACKLEN 2712 John Marshall Drive, Arlington, Va.

On July 13, 1971, the facts of this case were again discussed with Assistant United States Attorney (AUSA) ROBERT A.W. BORAKS. AUSA BORAKS advised that he still declined prosecution on the grounds it lacked prosecutive merit in that there was no evidence of any offense committed.

Appendix F

SA Nicholas Wultich's Memo to WFO, 7/14/71

FEDERAL BUREAU OF INVESTIGATION

Reporting office Washington Field	Office of origin: Washington Field
Date 7/14/71	Investigative Period 7/7-14/71
Report made by: Nicholas Wultich	Typed by: ww
Title Of Case ROBERT JONES LACKLEN	Character of Case Bribery--COI

REFERENCE: Bureau airtel to WFO, 7/2/71

ADMINISTRATIVE:

Subject was not interviewed earlier as he was out of town.

Enclosures for the Department being submitted as they may be of some value to the Department in the pending lawsuit in which subject is a potential witness for the plaintiffs.

For information Bureau AUSA ROBERT A.W. BORAKS was very displeased that the subject was interviewed and that the Department did not first consult him.

Appendix G

Lucy A. Hummer's Memo to File, July 8, 1971

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

To: File Date: July 8, 1971

From: Lucy A. Hummer, Attorney
General Crimes Section
Criminal Division

SUBJECT: Conversation with Wayne Frankenfield, F.B.I.

On July 2, 1971 Special Agent Wayne Frankenfield, FBI, called me regarding a memorandum we addressed to the Bureau requesting additional investigation in a conflict of interest case.

The case involved Robert Jones Lacklen, who, it is alleged, violated 18 USC 205. The case was referred to Justice by the Civil Service Commission. The initial investigation-interviewing witnesses and presentation for an Assistant United States Attorney was done all in one day. Lacklen himself was never interviewed and the Assistant United States Attorney declined prosecution. Because I felt the investigation was incomplete and that the Assistant declined without knowledge of all the facts on the case, I memoed the Bureau to interview Lacklen.

Frankenfield told me that it was his opinion there was no 205 violation and asked me if I thought there was a violation and if I would prosecute if he authorized the additional interview. I told him there could possibly be a violation, but that I did not yet have all the facts of the matter. Frankenfield persisted in stating that he did not want to conduct the requested interview unless I could inform him at this time that we would prosecute Lacklen. Frankenfield stated his office had many more important things to do than interview one witness when he could not receive the guarantee now that we would prosecute the interviewee. I persisted in stating that we did not think the investigation complete without this interview. Frankenfield finally agreed reluctantly, to have Mr. Lacklen interviewed.

I am writing this memorandum to the file because I consider Mr. Frankenfield's attitude highly obstructionist. I do not think this division should be placed in the position of having to guarantee the Bureau of prosecution prior to conducting investigations. and interviews. Seems to me the purpose of an investigation is to obtain facts upon which to base an intelligent decision on whether or not to prosecute, and that this decision can never be made prior to completion of an investigation.

Appendix H

SEP 19 1972

Honorable Sam J. Ervin, Jr.
Chairman
Subcommittee on Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Ervin:
This is in response to your letter of August 25, 1972 regarding Mr. Robert J. Lacklen, an employee of the Department of Labor. Mr. Lacklen was investigated by the FBI in 1971 because of an allegation that his activities violated the Conflict of Interest Statute. These allegations arose from Mr. Lacklen's activities on behalf of Complainants in a suit against the Civil Service Commission on the matter of racial bias in the Federal Service Entrance Examination.

During the investigation Mr. Lacklen was interviewed and he admitted that he "technically" may have violated the Conflict of Interest Statute, but denied that he received any compensation for his efforts on behalf of the complainants or that he ever divulged any information to the complainants or that he ever divulged any information to the complaintants' attorney which he had received as an employee of the Department of Labor.

The Assistant U. S. Attorney declined prosecution on the grounds that it "lacked prosecutive merit in that there was no evidence of any offense committed."

The question of what is proper disposition of investigation reports in potential criminal cases where no charges are broughtis a matter for the Department of Justice upon which we will not comment. The reports on Mr. Lacklen, however, reflect his conduct in a relatively high-level position concerning his treatment of Government business which related closely to his personal and professional pursuits, including those which may have constituted his principle means of support. Mr. Lacklen's capacity to distinguish between these sets of interests would be relavant consideration for most Federal positions to which he might aspire. Accordingly, we think it proper that this investigative information be retained in the file for whatever benefit it may be to any Federal agency which may consider Mr. Lacklen for employment.

Sincerely yours,

Robert E. Hampton
Chairman

Appendix I

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROBERT J. LACKLEN, Plaintiff,	)	Civil Action
v.	)	No. 75-0580
ROBERT E. HAMPTON, et al., Defendants.	)	

I, F.W.M. Janney, Director of Personnel of the Central Intelligence Agency (CIA) certify that I have custody of the personnel records of the Agency. The statements made herein are based upon my personal knowledge and upon information made available to me in my official capacity. A search was made of CIA records for any reference to Robert J. Lacklen. No CIA record was found which indicated that Robert J. Lacklen was ever considered for employment or association with the Central Intelligence Agency as described in above captioned litigation.

In testimony, whereof, I hereto sign my name this 25th day of May, 1976.

F.W. M. Janney
Director of Personnel
Central Intelligence
Agency

STATE OF VIRGINIA
COUNTY OF FAIRFAX

Subscribed and sworn to before me this 25th day of May, 1976.

J. Helen Court
Notary Public
My Commission Expires March 15, 1977

EXHIBIT "E"

Appendix J

March 6, 1973
1200 S. Courthouse Rd.
Arlington, Va. 22204

U.S Department of Justice
Wasington, D.C.

Dear Sirs:

In 1971 I was subjected to an investigation by the Federal Bureau of Investigation on the basis of a conflict of interest complaint initiated by Bob Hampton of the Civil Service Commission. On July 12, 1971 I was visited by two agents of the FBI.

The agents asked three questions:

1. Did I ever solicit any personnel officer of the government to serve along with me as a witness at the trial of the seven Blacks against the Civil Service Commission?

2. Did I ever receive any pay from Dave Tatel for acting as a consultant?

3. Had I ever disclosed any information obtained as a result of my employment in the Department of Labor to Dave Tatel?

My answer to all three questions was negative. I understand from the attached letter from Bob Hampton to Senator Ervin that the Assistant Attorney General declined prosecution on the grounds that the case lacked prosecutive merit in that there was no evidence of any offense committed.

Since the time of this investigation I believe that I have been denied employment by another government agency, based upon that agency's withdrawel from negotiations with me coinciding with their conducting a security investigation to bring my security clearance up to date covering the period since I left NASA in January 1965.

As a result of the agency withdrawing, Senator Sam Ervin wrote the attached letter to Mr. Hampton. Mr Hampton answered that the proper disposition of investigative reports in potential criminal cases where no charges are brought is a matter for the Department of Justice. Mr. Hampton went on to state that "we think it proper that this investigative information be retained in the file for whatever benefit it may be to any Federal agency which may consider Mr. Lacklen for employment."

It appears to me that the conflict of interest complaint was without merit and Mr. Hampton stated belief that the investigative information be retained in the files leads me to believe that the entire affair was a punitive measure against me because I had consulted with the plaintiffs in a case in which Mr. Hampton was one of the defendants.

I request that the Department of Justice remove all investigative reports and other information from the security files of the Department of Justice, the U.S. Civil Service Commission, the U.S. Department of Labor and any other government agency.

Sincerely yours,

Robert J. Lacklen

Appendix K

ROUTING AND TRANSMITTAL SLIP

REMARKS

The issue raised in this letter is not for the Criminal Division. It should be handled by OLC, Administrative Division.

Personally the guy should be told in no way will the FBI report be removed and if he objects to our decision, then let him sue the Government.

I do not believe he has a leg to stand on. But whatever, it is not for the Criminal Division.

Mr. Weglian
3/23/73

Appendix L

UNITED STATES GOVERNMENT
MEMORANDUM

DATE
(obliterated)

TO: Director, Federal Bureau of Investigation

FROM: Will Wilson
Assistant Attorney General
Criminal Division

SUBJECT: Robert Jones Lacklen; Possible violation of 18 U.S.C. 205

This refers to previous investigation of this matter by the Bureau on April 28, 1971.

We note from the investigative reports that Mr. Lacklen himself was never interviewed. You are requested to interview Mr. Lacklen to determine his motivation in making the telephone call to Arthur L. Tackman, and determine whether he has made any other efforts on behalf of plaintiffs in the pending law suit against Robert Hampton, Chairman of the Civil Service Commission, and whether he has received or has been promised any compensation for any of his efforts.

Copies of your report should be furnished to the appropriate United States Attorney and this Division.

Supreme Court, U.S.
FILED
JUL 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1617

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT J. LACKLEN, PETITIONER

v.

ALAN K. CAMPBELL, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1617

ROBERT J. LACKLEN, PETITIONER

v.

ALAN K. CAMPBELL, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL.

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Petitioner contends that it was improper for the district court to grant judgment against him without a trial.

1. Petitioner, a former Director of Personnel Management Evaluation at the Department of Labor, filed a complaint in the United States District Court for the District of Columbia alleging that he had wrongfully been forced to resign from his position. Petitioner sought reinstatement to his position with back pay and expunction of certain information contained in his personnel file. Petitioner also sought damages from Robert E. Hampton, then Chairman of the Civil Service Commission, for maintaining such information in his file, for allegedly causing an audit of his tax returns, and for allegedly interfering with his pursuit of professional employment and research. Petitioner claimed that Hampton had caused the audit of his tax returns for the

years 1971 and 1972 and had caused the Central Intelligence Agency to terminate negotiations with petitioner for research to be performed for that agency (Pet. App. 3a-5a).

The background of petitioner's claim is as follows. While petitioner was employed at the Department of Labor in 1970, he consulted on several occasions with an attorney representing the plaintiffs in *Douglas v. Hampton*, 512 F. 2d 976 (C.A.D.C.), in which plaintiffs complained that the Civil Service Commission's "Federal Service Entrance Examination" was racially discriminatory. Petitioner furnished to plaintiff's counsel in that case certain technical advice and assistance dealing with the validity of intelligence measures as applied to black persons. The General Counsel of the Civil Service Commission later asked the Justice Department to ascertain whether this consultation was a conflict of interest, which might violate 18 U.S.C. 205. Although an investigation was undertaken (Pet. App. 32a-54a), no prosecution was initiated (Pet. App. 4a-5a). Documents concerning the investigation were retained in petitioner's employment file. When petitioner's job was abolished, he resigned from the government and did not exercise his right to continued employment.

2. The district court properly dismissed petitioner's claim for expunction of information in his personnel file. Petitioner presently has an adequate administrative remedy, with subsequent judicial review, under the Privacy Act. See 5 U.S.C. 552a (d) and (g). Petitioner has not pursued those remedies, and the expunction claim thus was properly dismissed for want of exhaustion of administrative remedies. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *McGee v. United States*, 402 U.S. 479, 484.

For the same reason, the district court properly dismissed petitioner's claim for reinstatement and back pay. If petitioner voluntarily resigned, he obviously has no claim. The district court recognized, however, that a "coerced" resignation can constitute an adverse personnel action. If the resignation was equivalent to a dismissal, adequate administrative remedies are available and must be exhausted before suit. See *Goodman v. United States*, 424 F. 2d 914 (C.A.D.C.). There is no indication that petitioner's reinstatement claim has ever been presented to the employing agency or to the Civil Service Commission, or that exhaustion of available administrative remedies should be excused on the ground of futility. The district court therefore properly dismissed the reinstatement claim. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 69-78 and n. 22.

It was also proper for the district court to grant summary judgment against petitioner with respect to the claim for damages from defendant Hampton personally. It was clearly within the scope of Hampton's discretionary duties as the head of the Civil Service Commission to cause a possible conflict to be investigated and to maintain relevant information in petitioner's personnel file. See 28 U.S.C. 535(b), which requires agency officials expeditiously to refer to the Department of Justice information that may establish a criminal violation by government employees. Hampton therefore was immune from personal liability for his initiation of the inquiry. See *Butz* v. *Economou*, No. 76-709, decided June 29, 1978, slip op. 36-37.

Moreover, the district court gave petitioner the opportunity to discover information that might suggest the existence of bad faith, departure from duty, or malicious interference with petitioner's pursuit of professional employment. Petitioner presented no such

factual information, despite the district court's grant of supplemental discovery (Pet. App. 11a). Similarly, petitioner did not contradict an affidavit from a responsible official stating that petitioner's tax returns were chosen for audit solely through standard computer procedures, or an affidavit of the Central Intelligence Agency stating that the Agency had no record of any employment negotiations with petitioner (*id.* at 11a-12a). Under Fed. R. Civ. P. 56(e), therefore, summary judgment was proper whether Hampton's immunity is absolute or only qualified. See *Procunier* v. *Navarette*, No. 76-446, decided February 22, 1978; *Butz* v. *Economou*, *supra*, slip op. 19, 27-29. See also *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, which rejects petitioner's argument that summary judgment procedures violate the Seventh Amendment. The rulings of the district court and the court of appeals correctly applied recognized principles to the facts of this case, and there is no occasion for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

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